John S. Bartlett, Esq.
NV Bar #143
755 N. Roop St., Ste. 108
Carson City, NV 89701
(775) 841-6444
(775) 841-2172 [fax]
johnsbartlett@att.net

Attorney for Defendants

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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

PETER SZANTO, Plaintiff, vs. VICTOR ALEXANDER SZANTO and ANTHONY SZANTO, Defendants.	Case No. BK-N-13-52161-BTB Chapter 11 Adv. Proc. No.: 13-AP-05038 Hearing Date: April 9, 2014 Hearing Time: 10:00 a.m. Time for Hrg: 15 min.

MOTION TO SET ASIDE DEFAULT AND FOR DISMISSAL OF THIS ADVERSARY PROCEEDING FOR FAILURE TO TIMELY SERVE THE DEFENDANTS UNDER BANKRUPTCY RULE 7004(m)

Defendants Victor and Anthony Szanto, by and through their counsel John S. Bartlett, hereby moves this Court pursuant to Bankruptcy Rule 7055(c) to set aside the defaults that were entered by the Court Clerk in this case on December 26, 2013. This motion is based on the pleadings and papers on file herein, the proposed Answer to the plaintiff's Adversary Proceeding attached, and the following points and authorities.

POINTS AND AUTHORITIES

Plaintiff Peter Szanto is the brother of defendants Victor and Anthony Szanto. This adversary proceeding was commenced by the filing of the Adversary Complaint on July 29, 2013, shortly after Peter filed his pending Chapter 11 case on June 25, 2013.

Peter had summonses issued by the Bankruptcy Court on November 12, 2013 to both Victor and Anthony. See Docket Nos. 13 and 14. According to the returns of service filed by Peter on November 14, 2013 [Docket Nos. 15-17], on November 14, 2013 Peter had Patrick Peregrin of Nevada Judicial Services serve the Second Summons and Complaint on both Victor and Anthony by first class mail to the addresses listed. *Id.* See also, Exhibit B to Peter's Request For Entry of Default as to Defendant Anthony Szanto [Docket No. 18] and as to Victor Szanto [Docket No. 21]. No notice was issued to either Victor or Anthony that Peter intended to pursue a Default. It is true that as of December 24, 2013, when Peter filed his requests for the entry of a Default with the Bankruptcy Court, neither Victor nor Anthony had filed a response to the Complaint. However, the primary reason for this is neither Victor nor Anthony have been properly served with the Summons and Complaint. Peter has not served the Default on either Victor or Anthony, nor has he served the undersigned, whom Peter was aware had represented Victor and Anthony in responding to an unserved motion in the underlying Chapter 11 case.

Service of an adversary proceeding in a bankruptcy case is governed by Bankruptcy Rule 7004. A summons must be served with a copy of the complaint, and service must be completed within the time allowed by Rule 4(m). B.R. 7004(c)(1). "If a defendant is not served within 120 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against the defendant or order that service be made within a specified time." B.R. 7004(m).

The method of service is governed by B.R. 7004(e). "An individual – other than a minor, an incompetent person, or a person whose waiver has been filed – may be served in a judicial district of the United States by: (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or (2) doing any of the following: (A) delivering a copy of the summons and of the complaint to the individual personally; (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there, or (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process." Service of the Second Summons and Complaint on Victor and Anthony by mail is not an authorized method of service under B.R. 7004(e). Furthermore, service of a summons and complaint by mail is not an authorized method of service under Nevada law either. See NRCP 4(d)(6), (e)(2).

As noted above, and as can be seen by examining the returns of service filed on November 14, 2013, Peter served the Second Summons and Complaint by mail. Therefore, the Bankruptcy Court did not obtain personal jurisdiction over either Victor or Anthony in this adversary proceeding. *Kaczmarczik v. Van Meter*, 175 B.R. 64, 68-69 (9th cir. BAP 1994). Without jurisdiction over them, the Bankruptcy Court cannot enter a default against either Victor or Anthony in this adversary proceeding. *Id.*, at 69. The Defaults entered by the Bankruptcy Court are void, and must be set aside. *Id.*, at 67. Because neither Victor nor Anthony had been properly served they had no obligation to file a response to Peter's complaint. *Id.*

As noted above, this adversary proceeding was filed on July 29, 2013. Bankruptcy Rule 7004(m) requires service of the summons and complaint within 120 days of the date the action was filed. As of the date of this motion it has been 164 days since the commencement of this adversary proceeding, and the summons and complaint have still not been properly served. Therefore, Peter's failure to properly serve the Second Summons and Complaint on Victor and Anthony within the time required mandates a dismissal of this action without prejudice.

CONCLUSION

The return of service filed by plaintiff Peter Szanto unequivocally shows that he caused the Second Summons and Complaint by first class mail on defendants Victor and Anthony Szanto. Service by mail is not an authorized method of service of a summons and complaint under Bankruptcy Rule 7004(e). Therefore, this Court did not obtain personal jurisdiction over defendants Victor and Anthony Szanto at the time the Clerk entered Defaults against them for failure to timely response to the complaint, and so the Defaults must be set aside as void.

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Furthermore, because it has been 164 days since this adversary proceeding was filed, and defendants have not been properly served with process, this adversary proceeding should be dismissed without prejudice pursuant to Bankruptcy Rule 7004(m).

Dated this 10th day of January, 2014

/s/ John S. Bartlett

John S. Bartlett, Esq.
NV Bar #143
755 N. Roop St., Ste. 108
Carson City, NV 89701
Attorney for Victor and
Anthony Szanto

CERTIFICATE OF SERVICE

The undersigned, counsel of record for movants Victor Szanto and Anthony Szanto hereby certifies under penalty of perjury and pursuant to B.R. 7005 and FRCP 5(b)(2)(C) that on January 10, 2014 he caused the foregoing Motion to Set Aside Default and for Dismissal of this Adversary Proceeding For Failure to Timely Serve the Defendants Under Bankruptcy Rule 7004(m) to be served on plaintiff pro se Peter Szanto by depositing a true and correct copy in the United States Mail, postage prepaid, and addressed as follows:

Peter Szanto
3870 S. Carson St.
Carson City, NV 89701

_*/s/ John S. Bartlett*_________________
John S. Bartlett